No. 18,724

In the

United States Court of Appeals

For the Ninth Circuit

F. J. GUNTHER,
Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation
Appellee.

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STATEMENT OF THE CASE

The petition in this cause was filed pursuant to section 3 First (p) of the Railway Labor Act (45 U.S.C. 153 First (p)). This section provides that if a carrier does not comply with an order of a division of the National Railroad Adjustment Board (hereinafter referred to as Adjustment Board) within the time limit in such order, any person for whose benefit such order was made may file a petition setting forth briefly the causes for which he claims relief and the order of the division of the Adjustment Board in the premises. The division here involved is the First Division. Its Award and Order No. 17646 in Docket No. 33531 are both dated October 2, 1956. The interpretation and order in the same case bear the same numbers and are dated October 8, 1958.

On March 22, 1957, appellant (hereinafter referred to as petitioner) filed his petition in the District Court to enforce the above award, alleging that appellee (hereinafter referred to as carrier) had breached the collective bargaining agreement between carrier and the Brotherhood of Locomotive Engineers (hereinafter referred to as Engineers) which agreement applied to the employment of petitioner as a locomotive engineer. For many years petitioner had been employed by carrier in this capacity. During said period of time the Engineers' agreement contained articles 35, 38 and 47 which confirm the fact that engineer employees have seniority rights, but which articles do not deal with physical examinations or standard physical fitness requirements for the operation of carrier's trains by locomotive engineers. At no time material to this proceeding did these articles or any portion of the Engineers' agreement provide for a panel of three physicians to review the decision of the carrier's Chief Surgeon. Nothing was produced by petitioner to suggest the existence of such a three-doctor panel provision prior to the final judgments rendered by the District Court in favor of carrier on April 8, 1959 (in Civil No. 2080-SD-W) and October 27, 1961 (in Civil No. 2459-SD-W).

It appears in this record without challenge (R. 71) that locomotive engineers have always been required to pass periodic physical examinations to remain in service and that the required period applicable to engineers seventy years of age and over is every three months (quarterly). Petitioner passed such physical examinations within this requirement from November 24, 1953, through December 15, 1954, at which latter examination it was found that his heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion, petitioner was physically disqualified from active service

on December 30, 1954, and was advised to take his pension.

Thereafter, petitioner presented his grievance to the Adjustment Board, as mentioned above, and, on October 2, 1956, that tribunal declared:

> "It is true that Carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service."

A three-doctor panel was ordered without reference to any supporting agreement provision. The panel made its findings, which the carrier, and ultimately the District Court, interpreted as supporting the carrier's Chief Surgeon. Petitioner sought enforcement of the award and order based upon the findings of the three-doctor panel by petition to the District Court dated March 22, 1957. In that enforcement proceeding the court on April 15, 1958, issued its Memorandum Opinion and Order (161 F. Supp. 295) which stated on page 298:

> "We find that the complaint states no facts showing that any award or order has been made by the Adjustment Board with which the carrier has not complied.
>
> "We shall hold this cause on our calendar until July 14, 1958, at which time, in the absence of any cause to the contrary shown, the carrier may present to the Court findings, conclusions and judgment in accord with this memorandum. De Priest v. Pennsylvania R. Co., D.C., 145 F.Supp. 596, 600.
>
> "This cause is continued to July 14, 1948 at 10 A.M. for further proceedings."

On July 14, 1958, the court granted petitioner's motion for a stay of proceedings to March 6, 1959. This stay was granted to petitioner pursuant to his statement to the court that he had filed a petition before the Adjustment Board for an interpretation of its award and order or for the issuance of a supplemental award determinative of his right to reinstatement in active service with the carrier (R. 105). The District Court pointed out:

> "The Board (Adjustment Board) did render an award and order on October 8, 1958, but this second award was not presented to this Court in the case then before it, Case No. 2080." (R. 105-106)

Thereafter, the carrier presented a motion to the District Court for leave to file a counterclaim to bring the alleged interpretation and order of October 8, 1958, into Case No. 2080-SD-W, and set the motion for hearing on February 16, 1959 (R. 22). On January 3, 1959, petitioner filed his opposing brief, stating in part as follows:

> "The proposed counterclaim is premature. The Interpretation Award and Order issued by the National Railroad Adjustment Board on October 8, 1958, has not, as yet, been presented to this Court by petitioner for enforcement . . . ." (p. 1)
>
> "Petitioner's request for enforcement of said Interpretation Award and Order will be made either in the form of a supplemental petition in this action or by the filing of a new petition. *It will be done prior to February 16, 1959.*" (Emphasis supplied.) (p. 2) (R. 22-23).

Notwithstanding the foregoing, petitioner, on February 7, 1959, filed a motion for dismissal without prejudice and simultaneously served a proposed order to be signed by the court entitled "Dismissal for Want of Jurisdiction". On

February 9, 1959, the court denied the carrier's motion to file a counterclaim. On March 6, 1959, the transcript of proceedings of the hearing before the District Court on petitioner's motion to dismiss for lack of jurisdiction and carrier's motion for summary judgment contains the following at page 13 (lines 13-19):

> "MR. DECKER: . . . I want to make sure your Honor understands that with respect to the motion for summary judgment I am concerned lest the granting of such motion be construed at a future date as being res adjudicata with respect to the interpretive (sic) award which has never been pleaded before this Court . . . ." (R. 24)

On April 8, 1959, the District Court rendered summary judgment in favor of carrier and against petitioner in Case No. 2080-SD-W.

Approximately a year and a half later, on September 26, 1960, petitioner filed the petition in the instant case (No. 2459-SD-W) (R. 2-12).

On November 28, 1960, the carrier filed a Motion for Summary Judgment on the grounds of (1) res judicata, (2) statute of limitations, and (3) excess of the Board's jurisdiction in that the latter was creating an arbitration medical panel when no such right was established in the contract between the parties. In its memorandum opinion of March 27, 1961, the District Court denied the carrier's motion without prejudice as to ground (3) above (R. 45-55). After answering, the carrier filed a second Motion for Summary Judgment on May 16, 1961 (R. 84-98), asserting that the Adjustment Board had no authority to create contractual provisions under the guise of interpretation, citing *Southern Pac. Co. v. Joint Council Dining Car Employees,* 165 F. 2d 26, where the Ninth Circuit said in footnote 2:

> "Section 3, subd. First, subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

Petitioner's affidavit in opposition to this motion, dated May 29, 1961, is set forth at R. 99-101. On September 27, 1961, the court granted the carrier's Motion for Summary Judgment and issued its Opinion of that date (R. 104-59).

Petitioner appealed from said judgment to this court on November 27, 1961. While the appeal was pending and on June 5, 1962, petitioner moved for relief from operation of the judgment pursuant to Rule 60(b) F.R.C.P. and the District Court indicated its intention to entertain the motion. In presenting his motion, petitioner declined the court's invitation to specify any oral evidence and relied upon the affidavits of Mr. Colyar, General Chairman of Engineers, Mr. Decker, his attorney, and himself, in addition to the prior record in this case. The evidence thus offered to alter or change the District Court's judgment was the contention that the Engineers' agreement was amended in 1944-1945 by certain correspondence actually creating a three-doctor panel. No such correspondence was referred to by petitioner during the seven-year period of litigation prior to final judgment herein. Although the same counsel have represented petitioner throughout the entire period, they argue that carrier's attorneys in effect misled them by declaring that there was no provision in the agreement establishing a three-doctor panel and that they first discovered the correspondence showing the contrary to be true on February 28, 1962 (R. 225), while this case was on appeal in this court.

The carrier took the position that this correspondence could not qualify as "newly discovered" evidence because:

(1) it was a matter of record in the files of both the carrier and the Engineers' organization (both the unit representing Southern Pacific employees under their agreement and the unit representing carrier's employees under its agreement) for at least 17 years; (2) even if there were union rivalry which somehow interfered with the inspection of this evidence by amicable request, both the Engineers and carrier could have been subjected to discovery proceedings during the seven-year period of this litigation, but petitioner did not elect to use this procedure; (3) in any event, on March 28, 1960, General Chairman Colyar of the Engineers Brotherhood (representing the craft of locomotive engineers of carrier at all material times) and the Engineers Brotherhood were authorized to represent petitioner in handling to a conclusion the subject matter of this case (R. 255), and Mr. J. P. Colyar, in whose file the evidence was located, wrote to carrier asserting this claim on behalf of petitioner on March 29, 1960 (R. 254), which date was approximately six months prior to the filing of the within petition in the District Court (filed September 26, 1960, served on carrier in November of 1960); (4) Mr. Gunther, the petitioner, was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen (Firemen), whose union membership includes a number of locomotive engineers employed by carrier, and Mr. Gunther regularly processed claims against carrier based upon the latter's alleged violation of their rights under the Engineers' agreement (R. 225-226) and as such representative on behalf of himself and others, enforcing agreement rights, as described by his attorney, it is difficult to see how he could have overlooked any agreement provisions limiting the right of carrier's physicians to determine the physical qualifications of locomotive engineers when the unchallenged

rules of carrier require regular periodic examination of all such employees (R. 71); and (5) the Engineers' agreement applicable to petitioner at the time of his disqualification contained no provision for a three-doctor panel (R. 241) and in the reprinted agreement of January 1, 1956, (orange cover) there was no reference whatever to such a panel (R. 315, lines 1-4). The District Court denied the motion for relief from judgment on March 29, 1963, declaring (R. 314):

> "We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE Railroad."

REPLY TO SPECIFICATION OF ERRORS

1. The District Court properly granted summary judgment for the carrier because the pleadings and affidavits disclose that: (A) No genuine issue of fact remains for trial; (B) carrier's right to have its Chief Surgeon determine physical qualifications of locomotive engineers was not subject to any review by a three-doctor panel at any material time and until 1959; (C) petitioner did not contend that a three-doctor panel was in the Engineers' agreement from the date of his disqualification in 1954 until final judgment in 1961 and the Adjustment Board likewise made no reference to any such provision; (D) there is no claim herein of fraud or bad faith on the part of carrier, its Chief Surgeon or examining physicians; (E) the rules of carrier requiring locomotive engineers attaining seventy years of age and over to pass quarterly physical examinations, their applicability to petitioner, and petitioner's disquali-

fication as a result of his sixth successive examination are unchallenged.

2. The District Court properly granted summary judgment for the carrier because this case involves an unwarranted assumption of jurisdiction by the Adjustment Board in creating a three-doctor panel provision in the agreement. The Railway Labor Act limits the Board's jurisdiction to interpretation or application of such agreement. This case is therefore suited to disposition by summary judgment proceeding.

3. The District Court properly granted summary judgment for the carrier because the action of the Adjustment Board was beyond its jurisdiction. No implied finding of agreement violation can be contended for in the Board's decision.

4. The District Court properly denied appellant's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure because (a) the evidence was not newly discovered, and (b) the proceedings on said motion established that there was no three-doctor panel provision applicable to the petitioner's situation. Petitioner's latest contention is persuasive that the District Court was correct in finding that articles 35, 38 and 47 do not constitute any limitation on carrier's right to determine the physical qualifications of locomotive engineers.

ARGUMENT

I. Resume of Facts.

In conformity with the long-standing, unchallenged rules of carrier, petitioner submitted himself for physical examinations by the carrier's physicians every three months. Such quarterly examinations have historically and uniformly been required of employees such as petitioner who are past the age of seventy and propose to operate loco-

motive engines on trains. On December 31, 1954, petitioner was advised that he could not qualify for this responsibility because the physicians had detected a heart defect in his last quarterly physical examination. This was confirmed upon review by the Chief Surgeon. He was advised that because he was a candidate for a coronary episode he should consider accepting his pension. Petitioner obtained another doctor's opinion which he contends is at variance with that of the Chief Surgeon and progressed to the Adjustment Board his claim for a three-doctor panel review of the doctors' opinions and for reinstatement to active service. Although petitioner was a representative of many locomotive engineers in handling their agreement disputes with this carrier, he did not point to any provision in the collective bargaining agreement to support his claim with the carrier or before the Board. The Adjustment Board likewise cited no agreement provision but instead said ". . . it has not been unusual . . . for the Division to provide for a neutral board of three qualified physicians . . ." (R. 8). Thereafter petitioner obtained an award and order asserting that the carrier's Chief Surgeon was in error and he should be reinstated to active service with pay for all time lost since October 15, 1955. The carrier filed this Motion for Summary Judgment asserting that the Board exceeded its jurisdiction in creating a three-doctor panel without agreement support and in its award and order against the carrier.

The Court below deemed the entire agreement to be contained in the orange booklet of January 1, 1956 (R. 315). Petitioner does not challenge carrier's affidavit to this effect. The court likewise found no ambiguity in the green booklet of November 30, 1938, and interpreted the same as placing no restriction upon the carrier's right to physically

examine its locomotive engineers without submitting to review by panels of non-railroad doctors which may reach conclusions at variance with the opinion of the Chief Surgeon whose good faith is not challenged.

II. The Judgment Appealed from Is Correct and Is Fully Supported by the Uncontradicted Material Facts in the Carrier's Affidavits. The Supreme Court Cases in Point Show That Policy Considerations Do Not Militate Against the Summary Judgment Herein.

A. THE APPLICABLE RULES OF LAW.

1. The Summary Judgment procedure prescribed in Rule 56 F.R.C.P. is intended to dispose of actions in which there is no genuine issue as to any material fact even though an issue may be raised formally by the pleadings.* *Koepke*

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*Petitioner cites *Trowler v. Phillips,* 260 F.2d 924 (9th Cir. 1958), presumably as authority that in a case where the findings of fact and conclusions of law are unnecessary they indicate that a summary judgment should not have been granted. This was true in the *Trowler* case, where it was contended that plaintiff's copyrighted maps of Antelope Valley and Hesperia were published without his leave. The summary judgment was granted despite the necessity of examining the source material to see if the end product met the standards of copyrightability (*Trowler* case, page 926). Also the affidavit simply stated that "similar methods were followed" in the Antelope Valley maps when "too many of the facts alleged with respect to Hesperia were peculiar to Hesperia." (*Id.* at 926). *A R Inc. v. Electro-Voice, Inc.,* 311 F.2d 508, (7th Cir. 1962) is a situation where the issue presented by motion for summary judgment was whether plaintiff's patent was valid over the prior art which was documentary in form. The court did not find anything in plaintiff's deposition testimony, accepted as that of an expert in the field, "*which precipitates a genuine factual issue material to the resolution of the ultimate issue presented by defendant's motion.*" (page 511, emphasis supplied.) This is precisely like the instant case where the contract contains no limitation, the carrier's affidavits assert that none exist, the court and the carrier's memoranda respectively challenge petitioner to cite any limitation, and petitioner fails to point to any admissible evidence of the existence of a limitation over a period of several years.

Furthermore, the *A R Inc.* case distinguishes the *Trowler* case, *supra,* declaring that even though no genuine issue of fact exists,

v. Fontecchio, 177 F.2d 125, 127 (9th Cir. 1949); *Surkin v. Charteris,* 197 F.2d 77, 79 (5th Cir. 1952). The sufficiency of the allegations in the complaint do not determine the Motion for Summary Judgment. "The cases construing Rule 56 FRCP 'clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.'" *Lindsey v. Leavy,* 149 F.2d 899, 902 (9th Cir. 1945); *Duarte v. Bank of Hawaii,* 287 F.2d 51 (9th Cir. 1961).

In the *Surkin* case, supra, the court declared at page 79:

> "The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, the opposing party must sufficiently disclose what the

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specific findings might carry an "unwarranted implication that a fact question was presented." (page 513.) The court affirmed the summary judgment, noting that the District Court's order was cast in a form which set forth the reasons why "the Villchur patent lacked novelty and invention over the Olson patent."

The Court of Appeals for the Ninth Circuit in *Lindsey v. Leavy,* 149 F.2d 899 (1945), applied the correct rule in a criminal conspiracy case where appellees had filed motions for summary judgment and "supported these motions by extensive affidavits setting forth their connection and relationship with all matters pertaining to appellant and his claims in the instant case." (page 901.)

> ". . . In response to this record, appellant did not adduce facts which contradicted the essential and vitally material facts appearing in appellees' affidavits and exhibits." (page 901.)

On appeal, appellant complained of the absence of findings of fact and conclusions of law. This court said at page 902:

> ". . . Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment, *although the court may make such findings with or without request.* Failure to make and enter findings and conclusions is not error. Moore's Federal Practice, 1944 Supp. to Vol. 3, p. 116 and cases cited." (Emphasis added.)

In accord, see: *Page v. Work,* 290 F.2d 323, 328-329, 334 (9th Cir. 1961), *cert. den.* 368 U.S. 875; *Christianson v. Gaines,* 174 F. 2d 534, 536 (D.C. 1949).

evidence will be to show that there is a genuine issue of fact to be tried."

The carrier in the instant case has demonstrated by affidavits that there is no genuine issue as to the fact that the agreement contained no provision for a three-doctor panel review or for any other review of the Chief Surgeon's decision as to the physical qualifications of locomotive engineers. The agreement itself, the testimony of labor relations officers of the carrier, the demand for the first three-doctor panel by the union some five years later, the first such agreement in 1959 and the findings of the National Railroad Adjustment Board in Award 17646 and its "Interpretation" all conclusively show that the agreement contains no such limitation. The foregoing evidence establishes this material fact with clarity. The moving party has demonstrated that there is no genuine issue of fact.

In these circumstances it is incumbent upon the opposing party to disclose what the evidence will be to establish a genuine issue of fact. He may not hold back his evidence until trial. *Engl v. Aetna Life Ins. Co.* 139 F.2d 469 (2nd Cir. 1943); *Surkin v. Charteris, supra; Gifford v. Travelers Protective Assn.,* 153 F.2d 209 (9th Cir. 1946); *Orvis v. Brickman*, 196 F.2d 762 (D.C. 1952).

> "And although the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the Movant to Summary Judgment." 6 Moore's Federal Practice (2d Ed.) 2130.

At page 2131 this authority states:

> "To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the

> party opposing the motion must present the facts in proper form—conclusions of law will not suffice; . . ."

Petitioner in the case at bar has failed to meet these requirements.

First it is clear that defendant carrier has submitted with its affidavits the entire collective bargaining agreement (R.70). It was the complete agreement in all respects as reprinted with orange cover on January 1, 1956 (R.315). This agreement is unambiguous (R.124); hence the parol evidence rule bars the introduction of oral evidence to modify, add to or subtract from it. 6 Moore's Federal Practice (2d Ed.) 2235. And at page 2236 the following appears:

> "Where, then, after applying the parol evidence rule there remains no genuine issue of material fact, summary judgment should be rendered for the party entitled to judgment under applicable substantive law principles."

The second reason why petitioner's position in opposition to carrier's motion is inadequate is that he fails to point to or cite any provision in the agreement for medical arbitration. The three-doctor panel is simply an arbitration board to resolve conflicting medical opinions. There is no statute establishing such a panel and petitioner has not pointed to any such legislation. Thus the only way an arbitration panel can be imposed upon the carrier is by a provision in the collective bargaining agreement.

Petitioner completely failed to point to any such agreement provision from the inception of his first case in 1957 until the final summary judgment herein on October 27, 1961. In an effort to create an issue of lesser dimension, petitioner cited three sections of the applicable agreement

and contended that they constituted a limitation upon the carrier's right to remove petitioner from service as a locomotive engineer upon the medical opinion of its doctors. These three sections are:

Article 35—Seniority, Article 47—Investigations and Article 38—Reduction of Force (R.100). None of these sections in any way refers to physically incapacitated locomotive engineers. It is the function of the court to interpret agreement provisions. *Hamilton v. Liverpool etc. Insurance Co.*, 136 U.S. 242, (1889). Interpretation cannot be used as a vehicle for adding agreement provisions. The Adjustment Board erroneously attempted this. It is interesting to note that the Board pointed to no agreement provision whatever as a basis for its enforced medical arbitration or as a basis for any limitation whatever upon carrier's right to determine physical qualifications of these employees in good faith. Significantly the Board did not point to any of the three provisions now relied upon by petitioner to justify its award. *The Board indicates in its decision only that "it has not been unusual" for it to appoint an arbitration medical-panel. Such an invasion of the carrier's rights and responsibilities cannot be supported under the guise of "interpretation" or "application" of agreements**. It is important to note that the Adjustment Board award and findings were introduced into this case by petitioner in his verified petition. His own evidence negates his present contentions as to the basis for the Board's award.

Thirdly the inadequacy of petitioner's opposition to carrier's Motion for Summary Judgment is apparent from his failure to cite one instance where the carrier's disqualification of a locomotive engineer for physical reasons de-

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**Southern Pacific Co. v. Joint Council Dining Car Employees*, 165 F.2d 26 (9th Cir. 1947), *cert. den.* 333 U.S. 838.

termined by its doctors was challenged, nullified, appealed, modified or even mentioned. He cannot dissolve the affirmative showing made under oath by carrier by blandly stating that it was the custom and practice to observe articles 38, 35 and 47. This does not reach the issue of physical disqualification. It is therefore irrelevant. Nor did the Adjustment Board find that the carrier breached the agreement in any way or that there was any bad faith (R. 131-132). It simply undertook to order the parties to arbitrate without any supporting agreement provision.

It is not enough for one opposing a motion for summary judgment to come forward without countervailing evidence or at least a showing that some evidence will be introduced at the trial to dispute the facts contained in the affidavits of the moving party. *Wilkinson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945); *Gifford v. Travelers Protective Assn.*, 153 F.2d 209, 211 (9th Cir. 1946); *Port of Palm Beach District v. Goethals*, 104 F.2d 706 (5th Cir. 1939); *Radio City Music Hall v. United States*, 135 F.2d 715 (2nd Cir. 1943); 6 Moore's Federal Practice (2d Ed.) 2129; *Orvis v. Brickman* 196 F.2d 762 (D.C. 1952).

Petitioner's affidavit in opposition to the carrier's Motion for Summary Judgment (R.99-101) does not meet these requirements. The first page thereof (R.99) shows Mr. Gunther's thorough familiarity with the agreement and "its interpretation and application by the parties thereto in the operations of defendant." The second page (R. 100) then quotes articles 35, 47 and 38 of the agreement as the basis of petitioner's right to continued employment upon the principles of seniority, discharge only for good cause and reduction of force in the reverse order of seniority. But there is no mention in these rules of physical disqualification or inability to safely perform duties. Seniority (as

referred to in articles 35 and 38) provides for the relative eligibility of employees to perform available work.* These rules do not bear upon the question of illness or incapacity. A review of the Adjustment Board Award and "Interpretation" Number 17646 (R.148-151) will disclose that none of these rules were cited as barriers to the carrier's refusal in good faith to permit petitioner to operate a locomotive because of the doctor's opinion. Nor does petitioner in his affidavit contend that they provide such a limitation. Instead he claims that these rules are "vague, ambiguous and insufficiently certain to specify" the rights of employees and of the employer. On the last page of his affidavit, page 3 (R.101), petitioner states that the interpretation and application of the foregoing articles "were done by reference to a long history of custom and practice in the railroad industry." Thereafter in lines 8-20 of said page 3 (R.101), he simply repeats the wording of the three articles and asserts that the removal of petitioner from the assignment of his choice on December 30, 1954, violated his seniority rights because he was senior to the engineer who replaced him. Finally he asserts that it was never the custom and practice to retire an engineer against his will. This was the entire showing in opposition to carrier's motion.

Conceding all that petitioner asserts to be true, the carrier's affidavits and documents establish that summary judgment was properly granted by the District Court. There is no question in this case that the carrier acted in good faith (R.131-132). Mr. K.K. Schomp's supporting affidavit establishes without challenge (R.69-82):

1) That locomotive engineers have always been required to *take and pass* periodic physical examinations and re-

*Article 47—Investigation by its terms provides the means of dismissing employees from service for good cause.

examinations to determine their fitness to remain in service and this rule applies to locomotive engineers past age 70 on a quarterly basis (R.70; lines 22-28);

2) In accordance with this rule, Mr. Gunther, the petitioner, who was over 70, reported for such examinations each quarter until December 15, 1954, when examining physicians determined that his physical condition was such that he could not qualify to operate an engine (R.70-71);

3) These findings were reviewed by the Chief Surgeon who concurred in the conclusion that Mr. Gunther's heart was in such condition that he would be likely to suffer an "acute coronary episode." (R.71);

4) Until December 1, 1959, the collective bargaining agreement contained no provision for a three-doctor panel or any other review of the company's physicians, and their recommendations were final and binding (R.71, lines 27-32, R.72, lines 1-3).

Clearly the carrier has met its burden of showing specifically the facts upon which it relies to show that the agreement contained no review procedure in physical examination determinations; and that any imposition of a three-doctor arbitration panel by the Adjustment Board would be tantamount to writing such a provision into the agreement of the parties under the guise of "interpretation." Changes in collective bargaining agreements can only be initiated by the procedures set forth in section 6 of the Railway Labor Act (45 U.S.C. 156). In fact such a change was initiated by the union party to this agreement through the service of a "Section 6 Notice" under the latter section of the Act on August 28, 1959 (R.73). This resulted in an amendment to the very article 35 mentioned in petitioner's affidavit. This amendment dated November 3, 1959, is an exhibit to Mr. Schomp's affidavit in support of this motion (R.75-76).

It is equally apparent that petitioner has not contradicted any of the above material facts and has not presented any evidence to show that any genuine issue of fact exists. At a later point in this brief we will discuss petitioner's motion after judgment herein based upon Rule 60 (b) F.R.C.P. Suffice it to say at this point the affidavit of petitioner, discussed in detail above (R.99-101), demonstrates that he was engaged in enforcing the agreement on behalf of locomotive engineers, worked as an engineer himself and was thoroughly familiar with the interpretation and application of the agreement in the carrier's operations. Yet he did not challenge the carrier's affidavits or point to a single case supporting or making up any custom or practice affecting physical qualification or disqualification by the carrier's physicians.

Petitioner had extensive opportunity to present any facts which he deemed pertinent to the court in opposition to the carrier's motion. The court repeatedly suggested to both parties that they should present all such facts. The instant action was filed on September 26, 1960. On November 28, 1960, the carrier filed its Motion for Summary Judgment on several grounds with supporting affidavits. One of the affidavits attached as Exhibit "A" the agreement which was applicable to petitioner's contentions herein. Counsel for petitioner argued that the entire contract was not before the court and that the entire contract should be construed (R.53). On March 27, 1961, the court denied the carrier's Motion for Summary Judgment, without prejudice, and admonished petitioner in its Memorandum Opinion of that date to bring in the contract and its limitations (R.53). In the same opinion the court declared:

> "Counsel for the petitioner likewise hints that the contract is ambiguous and that a limitation upon the right which the defendant claims might be found in

> the contract in the light of parol evidence admitted as an aid in interpreting it. Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous.
>
> Summary judgment is an extreme remedy and should be awarded only when the facts are quite clear. (Kennedy v. Bennett, 261 F2d 20, Traylor v. Black, etc., 189 F2d 213.) Any doubt as to whether the motion should be granted must be resolved against the movant. (Booth v. Barber Transp. Co. 256 F.2d 927.) The function of a summary judgment is to eliminate sham issues (Irving Trust Co. v. U.S. 221 F. 2d 303)."

Thereafter on May 16, 1961, the carrier filed a second motion for summary judgment based upon the ground that the Adjustment Board exceeded its jurisdiction by ordering a medical arbitration panel without any supporting agreement provision. The carrier's Memorandum of Points and Authorities challenged petitioner to come forward with any evidence he might wish to assert in opposition to its affidavits. Thus the memorandum stated at pages 2 and 3 (R.85-86):

> "It [the agreement] contains no provision whatever creating a three-doctor panel to review the decision of the Carrier's physicians with respect to the physical fitness of its locomotive engineers to operate engines and trains. Nor can petitioner cite any such provision or practice in any affidavit which he might file in opposition to this motion for summary judgment. In this respect we think that this case is clearly determinable upon the proposition that one who sues for breach of contract must point to a provision in the contract which the other party has violated or he cannot prevail. Summary judgment is the appropriate method for disposing of this case. *Gifford vs. Travelers Protective Assn.*, 153 F.2d 209 (9th Cir. 1946)."

Despite all of the foregoing, petitioner filed only the affidavit of May 29, 1961, which we have described in detail above. There was no genuine issue of material fact. The summary judgment procedure was properly invoked.

The petitioner's citation of *Poller v. Columbia Broadcasting Sys. Inc.* 368 U.S. 464 (1962), is not in point because the court found in a 5-to-4 decision that summary procedures are improper in complex antitrust litigation where motive and intent play leading roles. In the *Poller* case four justices dissented, saying in part at page 478:

> "Further, the Rule [Rule 56 FRCP] does not indicate that it is to be used any more 'sparingly' in antitrust litigation (ante, p. 473) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others .... there is good reason for giving the summary judgment rule 'its full legitimate sweep in this field.'"

And at page 480:

> "Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy narrow or far-reaching, had been hatched."

In *White Motor Co. v. United States* 372 U.S. 253 (1962), the court said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller vs. Columbia Broadcasting System* 368 U.S. 464, 473, they are not appropriate where motive and intent play leading roles."

It is asserted on page 26 of his brief that even if appellant has failed to disclose a factual issue at the trial level he may raise one on appeal, citing 6 Moore's Federal Practice (2d

Ed.) 2365. But the same authority on the same page states:

> "But an appellant may not, as a general rule, overturn a summary judgment by raising in the appellate court an issue of fact that was not plainly disclosed as a genuine issue in the trial court" and ". . . the opposing party is not, however, entitled to hold back his evidence until trial . . ."

In light of the foregoing discussion it is clear that petitioner has had a period of years in which to disclose such an issue and his failure to do so shows that no such issue exists.

Also on page 26 petitioner states the proposition that summary judgment is improper if the contract is ambiguous and there is a factual issue as to its meaning. As we have shown above there is no factual issue as to meaning since there are no facts to show that a three-doctor panel arbitration of the Chief Surgeon's decision existed at any material time. The facts demonstrate that the contrary is true. Nor are articles 38, 47 and 35 ambiguous. Furthermore, they do not apply to physical disqualification.

The case of *Osborn v. Boeing Airplane Co.,* 309 F. 2d 99 (9th Cir. 1962), cited by petitioner for this proposition is not in point. That case involved a summary judgment where the pre-trial order stated that plaintiff employee had submitted an idea to his employer through the company's suggestion system on a form reserving to the company the right to finally determine entitlement to cash awards. The appellate court reversed the judgment, stating at page 103:

> "Where, as here, the *existence and terms* of a contract must be determined by drawing inferences of fact from all of the pertinent circumstances, and the possible inferences are conflicting, the choice is for the jury." (Emphasis supplied.)

The case also contained a dispute as to whether a quasi-contractual obligation was present. Petitioner also relies upon *International Union of Mine, Etc. v. American Zinc, L. & S. Co.,* 311 F. 2d 656 (9th Cir. 1963). That case is dissimilar to the instant case in that it involves a dispute over the meaning of the words "membership dues" in the check-off clause of an agreement. The Department of Justice, in enforcing Section 302 of the Labor Management Relations Act, 1947, construed the term "membership dues" to cover "assessments". The National Labor Relations Board had held both ways on different occasions. In light of this the words "membership dues" were held to be ambiguous and not self-evident on the basis of the record there presented.

On page 27 of his brief, petitioner argues that some authorities hold summary judgment improper "in cases involving constitutional or other large public issues." He cites *Kennedy v. Silas Mason Co.* 334 U.S. 249 (1948), as authority for this statement, but analysis of that opinion reveals that where the record is clear and there is no triable issue of fact summary judgment ought to be granted regardless of the complexity or importance of the issues. That this is the correct interpretation of the *Kennedy* opinion is confirmed by the court's decisions in three antitrust actions involving issues of great public importance.* In each of these cases the Supreme Court affirmed the granting of summary judgment because the record was adequate and presented no triable issue of fact.

It should be further observed that the existence of an important, difficult, or complicated question of law is not per se a bar to a summary judgment if there is no genuine issue of material fact.

**Associated Press v. United States,* 326 U.S. 1 (1945); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *United States v. United States Gypsum Co.,* 340 U.S. 76 (1950).

B. THERE IS NO UNRESOLVED FACTUAL ISSUE IN THIS CASE, AND IN PARTICULAR THERE IS NO SUCH ISSUE WITH RESPECT TO THE SENIORITY RIGHTS OR CONTINUED ACTIVE EMPLOYMENT OF PETITIONER.

Summary judgment should be rendered even though an issue may be raised formally by the pleadings where supporting affidavits and the opposing affidavits, if any, show that there is no genuine issue of material fact. 6 Moore's Federal Practice (2d Ed.) 2069; *Lindsey v. Leavy* 149 F.2d 899, (9th Cir., 1945) cert. den. (1946) 326 U.S. 783; *Gifford v. Travelers Protective Ass'n.* 153 F. 2d 209 (9th Cir., 1946). Affidavits are to be made on personal knowledge, shall set forth such facts as are admissible in evidence and shall show the competence of the affiant (Rule 56 (e) F.R.C.P.). In compliance with the foregoing rule the carrier presented the following material facts under oath:

(1) On December 30, 1954 there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service (R. 70, lines 15-21).

(2) In 1954 long-standing requirements of carrier provided that locomotive engineers of age 70 and over must pass physical examinations to determine their physical fitness to remain in service (R. 70, lines 22-25).

(3) Petitioner reported for such a physical examination on November 24, 1953, and thereafter on a quarterly basis until December 15, 1954, when examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer because he was likely to suffer an acute coronary episode. Based upon this medical opinion the carrier physically disqualified him from active service on December 30, 1954 (R. 70).

(4) On August 23, 1959, the Engineers, speaking through General Chairman J. P. Colyar, recognized the absence of a three-doctor panel from the agreement by serving a demand upon carrier for such a provision on August 28, 1959, and it was negotiated into the agreement on December 1, 1959 (R. 72-74).

None of the foregoing material facts have been controverted anywhere in this case, whether by means of pleading or by affidavit. The unchallenged facts demonstrate that no provision for a three-doctor panel existed prior to 1959, and that petitioner was properly withheld from actively operating a locomotive.

On pages 28 through 30 of his brief, petitioner points to the allegations in his petition as creating a factual issue. He argues that he did not allege the agreement "to be a written agreement nor did he refer to any particular instrument." However, on June 1, 1962, in support of this contention for a three-doctor panel in 1954, Mr. Decker, petitioner's attorney, avowed that until 1962 he believed that the green-covered booklet dated March 1, 1935, contained all of the terms of the Engineers' agreement applicable to petitioner (R. 225, 228). His argument was that he erroneously relied upon and accepted various sworn declarations which became transparent to him no earlier than 1962. Thus petitioner relied upon an affidavit of Mr. W. D. Lamprecht, Vice President of carrier, *dated February 13, 1958,* which declared under oath that the agreement in December, 1954, was the green-colored booklet dated March 1, 1935, plus amendments, *the sum total of which are contained in the orange-colored booklet which contained the entire Engineers' agreement as of January 1, 1956* (R. 227). Petitioner also relied upon a similar affidavit of Mr. K. K. Schomp, Manager of Personnel of carrier *dated November 25, 1960* (R. 229-230),

and his later affidavit containing the same declarations *under date of May 11, 1961* (R. 232-233). He points also to the Memorandum of Points and Authorities filed on *May 11, 1961,* by carrier's attorneys pointing out the fact that until December 1, 1959, there was no provision whatever for a three-doctor panel in the controlling agreement (R. 233). In the latter document, the following appears:

> "... It is clear that there would have been no occasion for such an amendment (December 1, 1959, referred to above) if there had been a provision for such a review [of the decision of the carrier's Chief Surgeon upon physical examination] in the agreement. *It is significant to note that petitioner cannot challenge* this statement in an affidavit." (Emphasis and material in brackets added). (R. 233)

Petitioner now asserts that he was General Chairman of the Firemen who regularly represented locomotive engineers in their agreement disputes with carrier (R. 225); that he provided his attorney with the green-covered booklet dated March 1, 1935, advising that "it contained all the terms of employment by said railway company of its locomotive engineers in effect at the time he was removed from active service by defendant on December 30, 1954" (R. 226); that, as described above, all of carrier's officials and negotiators filing affidavits herein agreed that there were no other terms, and in particular was no provision for a review of the Chief Surgeon's decision by a three-doctor panel or by any other means whatever (R. 225-233); that he, himself, was mistaken and all of the carrier officials signing affidavits misled him with their incorrect and untrue assertions under oath (R. 234); that he did not find time to initiate discovery proceedings to discover the facts from the Engineers'

Union or the carrier during the period 1957 through 1961;* that although he designated and employed the General Chairman of Engineers, Mr. J. P. Colyar, to represent him in this very matter (R. 254-255) in the spring of 1960 and at least six months before filing this action on September 26, 1960, and eight months prior to serving the complaint upon carrier in November of 1960, he (petitioner) did not have reasonable access to the evidence which he discovered for the first time in 1962 (R. 225) when this cause was before this court; and that the "newly discovered" evidence (letters of 1944, 1945 and 1947) from and to Mr. Colyar's predecessor general chairman contained in the files of Engineers and carrier should belatedly establish a right of review of the Chief Surgeon's decision.

1. Neither the green booklet nor any amendment thereto provided for any three-doctor panel arbitration of the Chief Surgeon's decision. There is no uncertainty or ambiguity whatever in this case.

From page 31 through 36 of his brief petitioner argues that there is an ambiguity which requires the resort to extrinsic evidence because the green booklet† may have had a number of amendments between March 1, 1935, and December 30, 1954.

This contention is completely without foundation. Petitioner's own affidavit filed in support of his later position under Rule 60 (b) F.R.C.P. under date of June 5, 1962, contradicts the argument on this point (R. 222, lines 5-16):

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*On page 53 of his brief, petitioner states: "Appellant has been too busy fighting for survival against defendant's motions for summary judgment to proceed in the usual fashion by deposition, and otherwise, all available evidence as to the terms of the applicable agreement as of December 30, 1954."

†Green-covered printed collective bargaining agreement between the Brotherhood of Locomotive Engineers and the defendant carrier dated Mareh 1, 1935, introducted as Exhibit "A" to the affidavit of Mr. Sehomp in support of Carrier's Motion.

> "At all times prior to reading said affidavit of J. P. Colyar [filed on June 5, 1962, R 187-219] it was my understanding that the SD&AE-BofLE agreement *contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel* until January 1, 1956, when a provision was included as the last two paragraphs of Article 35 of the orange-colored booklet, 'Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers effective January 1, 1956', which was attached to the affidavit of W. D. Lamprecht filed in Action No. 2080-SD-W on or about February 13, 1958." (Emphasis supplied)

This was the affirmative understanding of petitioner, the general chairman of the firemen's organization, who worked as an engineer and who was "actively engaged in enforcing the provisions *of the Agreement referred to in his petition herein*" (Mr. Gunther's affidavit filed May 29, 1961; R. 99-101; Emphasis supplied).

This was also the affirmative understanding of Mr. K. K. Schomp, Manager of Personnel of carrier, whose affidavit filed December 2, 1960, states in part (R. 39, lines 26-32; R. 40, lines 1-14).

"As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical condition, the aforesaid collective bargaining agreement, in-

cluding amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee."

Substantially the same language appears in Mr. Schomp's affidavit filed May 16, 1961 (R. 70, lines 15-21; R. 71, lines 27 to end). There is no ambiguity or conjecture in the fact that all parties understood that no such limitation existed in the agreement. The Adjustment Board likewise pointed to none. Consequently the District Court was correct in its interpretation of the agreement. *Hamilton v. Liverpool etc. Insurance Co.,* 136 U.S. 242, *supra.*

2. In this proceeding the unchallenged facts show that the Adjustment Board exceeded its jurisdiction by writing a contract provision under the guise of interpretation. Petitioner's contention that findings in excess of jurisdiction have presumptive validity is a bootstraps argument.

Petitioner's argument on pages 36 to 43 of his brief goes beyond the purport of the first 35 pages in that he now disavows the necessity of an agreement provision to support an award of the Adjustment Board.

This new approach also conflicts with the declaration of this court in *Southern Pacific Co. v. Joint Council Dining Car Employees*, 165 F. 2d 26 (9th Cir. 1945) *Cert. den.* 333 U.S. 838. In footnote 2, the Court states:

> "Section 3, subd. First, Subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

The court noted that the Board itself has interpreted its own powers the same way, and quoted the Board as saying:

> "From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties . . ."

In accord see: *Thomas v. New York & St. L. R.R.,* 185 F. 2d 614, 616 (6th Cir. 1950); *Munhollon v. Pennsylvania R. R.,* 180 F. Supp. 669, 673 (N. D. Ohio 1960). 45 U.S.C. 153 First (i).

The objective of this section of the petitioner's brief is to avoid the obvious defect in the Adjustment Board order that a three-doctor arbitration panel should establish petitioner's physical qualifications. Petitioner now argues that the real issue before the Board was whether he was discharged from service without good cause. A review of the provisions of article 47 will at once disclose that it deals with discharges of physically qualified employees for rule violations. In *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas* 268 S.W. 2d 726 (Texas App.) the court considered the claim of a railroad employee that he was wrongfully discharged when he was disqualified upon examination by the company doctor. He demanded a three-doctor panel which was refused. No such panel was contained in the agreement at the time or at all until February, 1950. The court held that plaintiff had no cause of action for wrongful discharge under the agreement, saying at page 734:

> ". . . There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been plead by plaintiff."

The proper interpretation of the agreement establishes that Article 47—Investigations was never intended to apply to cases of physical disqualification. This section deals with guilt or innocence of an offense which has been allegedly committed by an employee. It requires an investigation hearing prior to discharge. No claim has ever been made by petitioner heretofore that he was discharged in violation of the limitation to which he now points—Article 47—Investigations on page 74 of the agreement. The Board made no mention of that section and no claim thereunder was presented to it. The record contains an amendment to Article 35—Seniority dated November 3, 1959 (R. 41) providing for a three-doctor arbitration panel in the circumstances present in this case. The Union demand for this amendment to Article 35—Seniority appears at R. 42-43. This situation and the non-applicability of any specific agreement provision on December 30, 1954, is avowed in the affidavit of Mr. Gunther dated June 5, 1962 (R. 222). The petitioner's failure to exhaust the contractual and administrative remedies in connection with a claim of wrongful discharge and failure to accord an investigation would not only indicate his understanding that article 47 does not apply but also would bar such a contention at this late date. *Barker v. Southern Pacific Co.,* 214 F. 2d 918 (9th Cir. 1954); *Breeland v. Southern Pacific Co.,* 231 F. 2d 576 (9th Cir. 1955); *Peoples v. Southern Pacific Co.,* 232 F. 2d 707 (9th Cir. 1956).

In each of these cases the Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of the defendant railroad party to the collective bargaining agreement where it appeared that either the contractual or administrative remedies had not been pursued by plaintiff.

The issue of discharge or suspension from service for a violation of rules as contemplated by Article 47 was not in-

volved before the Adjustment Board. The issue before the Board was whether petitioner could obtain a review of the Chief Surgeon's decision by a three-doctor arbitration panel (R. 7):

> "Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board *as here sought* and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review." (Emphasis supplied.)

As we have reiterated herein, the unchallenged affidavits prove that no such contractual provision existed and the Board's findings (R. 7-12) point to none. The only justification given by the Board for its order is: "it has not been unusual . . . for the Division to provide for a neutral board of three qualified physicians . . ." (R. 8) The issue was not, as petitioner argues on page 37 of his brief, whether he was removed from active service for good cause. The Board was required to find a contractual right to medical arbitration as a predicate to ordering one. No such finding is made and no such provision in the agreement is cited.

If the Board is authorized to write agreements for arbitration and impose them upon the parties without their consent the section of the Railway Labor Act dealing with interpretation and minor disputes (45 U.S.C. 153 First (i)) will to that extent consume and supplant the section of that Act dealing with contract negotiations and major disputes (45 U.S.C. 156). *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711 (1945).

If Mr. J. P. Colyar and the Brotherhood of Locomotive Engineers really believed that the agreement provided for a three-doctor arbitration panel they would not have made such a demand upon the carrier on August 28, 1959 (R. 73-

74). This demand states that it is under section 6 of the Railway Labor Act (45 U.S.C. 156) and article 68 of the agreement covering engineers of the carrier (green booklet, p. 82). The demand is to *adopt* the three-doctor panel provision "as the second paragraph of section 1, article 35, of the S.D. & A.E. Engineers' Agreement" (R. 73). The first paragraph of Article 35—Seniority, section 1, reads (R. 152):

> "Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer."

This same section 1 is the provision to which petitioner points as the restriction upon the carrier from effectively determining the physical qualifications of locomotive engineers through its doctors (R. 99-101). Attention is invited to the agreement effective December 1, 1959, amending section 1 of article 35 as a result of the above demand under section 6 (R. 75-76).

On page 37 petitioner argues that the Board was required to impose medical arbitration despite the agreement. If this were true there would be no rights left to either party since it could not object to arbitration on any subject. If the Adjustment Board is thus elevated to such a dictatorial position there would be no need for agreements. Negotiations could not be carried on between management and labor because neither would have any rights to concede. The case cited by petitioner, *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962) involves the review of a motion to dismiss a petition to enforce an award of the Adjustment Board pursuant to 45 U.S.C. 153 First (p). The Board had found that Mr. Hodges had obtained a judgment against the carrier on an FELA claim for permanent disability

based upon his claim and medical testimony, recovering therefor the sum of $22,000.00; that he was thereupon removed from service without any charges or investigation as required by the collective bargaining agreement; that he then appealed his "discharge" under the agreement relying upon a medical report which now stated that he "should be employable at any work he wants to do, the foot at the present time is not disabling to him in any way"; that the carrier refused to give him a physical examination; and that the carrier denied his request for a three-doctor panel to determine his physical condition. On page 441 the court explained:

> ". . . To determine physical capacity, the Board, in effect, ordered a medical *compulsory arbitration.*" (Emphasis supplied)

At the outset it is interesting to note that the Fifth Circuit on the one hand points out that the courts are overburdened and a prime concern should be in simplifying litigation and on the other hand avoids any decision on the legal aspects of the case and instead orders the establishment of a medical arbitration panel to determine physical fitness. The salient points in this decision are:

1) Physical fitness is not even an issue in light of *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510 (3rd Cir. 1953), where the court, speaking through Circuit Judge Hastie, dealt with a similar case where an employee had recovered $27,750.00 under the FELA for permanent loss of earning ability as a result of the negligence of the carrier. Shortly after his recovery the plaintiff called upon the carrier to reinstate him in his job, relying upon the agreement. Like Mr. Hodges, Mr. Scarano asserted physical ability to perform his duties despite his recent contrary representations which led to his recovery in the FELA case.

The carrier refused to reinstate Mr. Scarano or to examine him to determine his physical condition. The court affirmed judgment in favor of the carrier noting that the two above inconsistent positions are not to be tolerated; "And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." (p. 513) At page 512 the court declared that plaintiff's physical condition at the time when he sought reinstatement could not be established: "We hold that in the circumstances of this case plaintiff was estopped from making such an assertion." In the *Hodges* case the carrier's argument on this basis (310 F.2d 441) was rejected without discussion in deference to the view of the Board that a determination of physical fitness is essential to the final disposition of the matter before it. As the court in *Hodges* was in possession of facts showing that physical fitness was thus immaterial, it was inconsistent to object to the duration and complication of the litigation and at the same time to order a three-doctor compulsory arbitration panel to determine a fact which could never be in issue.

2) The *Hodges* case involves a different question than does the *Gunther* case. Hodges was refused any physical examination at all on the theory that he was estopped. The Board was confronted with an alleged deprival of seniority rights without any basis or reason which it would recognize; therefore it ordered a physical examination. In *Gunther* the carrier accorded the employee a physical examination by its doctors in accordance with long-standing rules which Mr. Gunther observed (R. 71). No challenge is made to these significant facts.

3) In *Hodges* the court distinguishes the *Gunther* case on the basis that in the latter case the three-doctor panel

had issued its medical arbitration report, which enabled the enforcing court to "determine the validity of the award based in part on such report. Thus, this determination may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested. After many years of juridical travail, that was the end result in *Gunther v. San Diego & Arizona Eastern Ry., supra,* in the final decision. D. C., 198 F. Supp. 402."

In light of the foregoing it is clear that the *Hodges* case, *supra,* does not decide any issue pertinent to the instant case. The facts are readily distinguishable.* The court declares that the question of the carrier's right to examine employees physically is now ready for decision, as was the end result in the *Gunther* case. Furthermore the case is now pending in the District Court before Judge Morgan for further proceedings.

Most of petitioner's discussion on pages 37 and 38 deals with discharge for cause which we have shown is not involved and was not claimed before the Board or referred to by it. Petitioner has not contended that the carrier acted in bad faith and has presented no facts to support such a contention (R. 131, line 30, through R. 132, line 14). There is no basis in the record for the statement on page 38 that the Board found either that the carrier had acted arbitrarily, without good cause, in bad faith or in violation of the agreement.

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*No physical examination was accorded to Mr. Hodges by the carrier, but since the court considered his ability to work to be material the carrier had removed his name from the seniority roster improperly. In *Gunther* the physical examination was accorded in good faith as is established by the facts. Mr. Gunther's name also remains on the seniority roster.

From pages 39 through 48 petitioner argues that the District Court infringed upon the Adjustment Board's powers as an arbitrator. This entire contention misconceives the difference between the industries subject to the National Labor Relations Act (NLRA: 29 U.S.C. 141 et seq.) and those subject to the Railway Labor Act (RLA: 45 U.S.C. 151 et seq.).

The scheme of the NLRA is to provide for the enforcement of arbitration clauses in collective bargaining agreements by court proceedings under section 301 of the Labor Management Relations Act (LMRA: 29 U.S.C. 185). In these proceedings the Supreme Court has held that all doubts should be resolved in favor of the submission to arbitration in the first instance.* The Supreme Court in each case of the Trilogy points out that it is the arbitrator's construction of the contract that the parties bargained for. (See quotations and analysis of these cases by the District Court in R. 137-140.)

The scheme of the Railway Labor Act is quite different. As we have demonstrated herein, section 3 First (p) (45 U.S.C. 153 First (p)) of the Act provides that if a carrier does not comply with an order of the Board, a suit for enforcement, like the case at bar, may be brought within two years. "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

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*Steelworkers Trilogy: *United Steelworkers vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers vs. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers vs. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

In *Brotherhood, etc. v. Atlantic Coast Line R.R.,* 253 F.2d 753, 757-58, Chief Judge Parker of the Fourth Circuit, said:

> "If it had been intended, as appellant argues, that the orders of the Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

Petitioner notes that in *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.,* 353 U.S. 30 (1957), the court affirmed an injunction against a strike called for the purpose of obtaining concessions from the railroad in cases pending before the Adjustment Board. The court referred to the Board procedure as being a type of compulsory arbitration of pending cases. In *Brotherhood of Locomotive Engineers v. Louisville & N. R.R.,* 373 U.S. 33 (1963), the Supreme Court enjoined a strike called for the purpose of obtaining concessions from the railroad in cases which had been decided against them by the Adjustment Board on the theory that the court proceedings under section 3 First (p) et seq. of the Railway Labor Act are part of the compulsory settlement procedure which must be utilized instead of self-help.

In light of the foregoing the District Court properly observed the Railway Labor Act in this suit under section 3 First (p) when it refused to enforce an order which was demonstrably beyond the Board's jurisdiction.

3. Policy considerations do not favor a usurpation of jurisdiction by the Adjustment Board any more than they would favor such action by a court.

From page 44 through page 48 of his brief the petitioner argues that the provisions of the Railway Labor Act do not support the use of the summary judgment procedure in an enforcement suit under section 3 First (p) (45 U.S.C. 153 First (p)). In support of this view he cites *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951) and *Hodges v. Atlantic Coast Line R.R., supra,* which we have already discussed.

In the *Kirby* case the appellate court declared that an award of the Board which is vague may be made the basis of an enforcement proceeding. Under section 3 First (p) the district courts "are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the * * * Board." (Page 796)

The court continued on page 796 as follows:

> ". . . But it (Congress) has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board prima facie only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings."

The Court of Appeals in *Kirby* then considered another point upon which it reversed the lower court and at the same time demonstrated that the procedure in an enforcement suit is the same as in actions at law generally. This involved the question whether the proper employees were given notice. It was held that the carrier must raise such a question of fact affirmatively as distinguished from the motion to dismiss addressed solely to the pleadings as in *Kirby,* in order to overcome the presumption of validity of

the award. The court pointed out that on remand the District Court could determine what employees were entitled to notice and whether they received it. At page 800 the court concludes: "In the event that the defendant fails to meet the burden of upsetting the Board's award on this basis, the case may then proceed to a trial on the merits." It is also to be recalled that in *Hodges* the plaintiff had been deprived of his entire employment relationship without a physical examination on the basis of estoppel. There the court felt that there should be a physical examination in the record before determining the validity of the award which "may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested." 198 F. Supp. 402.

Neither *Kirby* nor *Hodges* supports petitioner's argument that "the capacity of the award to support this enforcement action is not dependent upon there being such a provision in the applicable agreement." (Petitioner's brief; pages 36-37) Instead they point out that the carrier's position and the decision below are correct.

In *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326 (7th Cir. 1948) the court affirmed the lower court's dismissal of an enforcement proceeding under section 3 First (p) of the Act on two grounds, one of which was that "there are no facts disclosed in these so-called findings upon which an award could be based." 166 F.2d 329. The claim was that two yardmen had been improperly granted seniority rights, thus depriving two regular yardmasters of their standing. At page 330 the court declared:

> "We are of the view that it cannot reasonably be held that the award and findings in the instant case

> are sufficiently definite and certain as to make a prima facie case in favor of the plaintiff. *Plaintiff necessarily cannot rely upon the findings and award but must offer additional proof in support of the allegations of its bill.*" (Emphasis supplied.)

Petitioner recognizes the fact that the *Railroad Yardmasters* case requires that the necessary material facts must be shown in the award if it is to be given any prima facie weight in an enforcement proceeding. Because it obviously emphasizes the lack of any agreement provision to support compulsory medical arbitration in the *Gunther* case, at bar, petitioner characterizes the former case as "unenlightened." *System Federation No. 59, etc. v. Louisiana & A. Ry.,* 119 F.2d 509 (5th Cir. 1941), and *Smith v. Louisville & N. R.R.,* 112 F. Supp. 388 (Ala. 1953) are in the same category according to footnote 38 on page 45 of his brief.

Commencing on page 46 petitioner's brief presents an argument to the effect that the statutory procedure in the Railway Labor Act unduly restricts employees; and therefore the Board Awards should be given special weight. But the fact is that the Act was passed in the public interest to avoid strikes over minor issues by providing a peaceful, mandatory and exclusive system for resolving grievance disputes. *Locomotive Engrs. v. Louisville & N. R.R.,* 373 U.S. 33 (1963). Petitioner does not point out the fact that the employer is restricted as well. In *Order of Conductors v. Southern Ry.,* 339 U.S. 255 (1950), the court held that a state court could not take jurisdiction over an employer's declaratory judgment action concerning an employee grievance subject to sec. 3 First because the other party would be deprived of his privilege under that section to refer the dispute to the Board. After an award is rendered in favor of an employee he may bring an enforcement action which

is to "proceed in all respects as other civil suits." As the court declared in *Nord v. Griffin,* 86 F.2d 481, 484 (7th Cir. 1936), with regard to section 3 First (p) of the Act:

> ". . . The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

III. The District Court's Denial of Relief Under Rule 60 (b) Was Proper.

There was no abuse of discretion in the court's refusal to reopen the judgment some eight months after its entry. We shall set forth our reasons for this statement, but to avoid restating our detailed analysis herein the court's attention is invited to "Defendant's Memorandum in Opposition to Motion Pursuant to Rule 60 (b)" appearing in the record as R. 288-302. The District Court's opinion denying the motion appears at R. 306-318.

At pages 48 and 49 of petitioner's brief he describes the events which led up to the motion under Rule 60 (b) F.R.C.P. The record herein shows that in light of all of the facts none of the requirements of Rule 60(b) were satisfied; and even if they had been observed the "newly discovered evidence" did not establish any limitation upon the Chief Surgeon's decision by reason of which Mr. Gunther was disqualified from operating a locomotive.

We have shown herein that this action was filed in September of 1960 and petitioner was given numerous opportunities by the court to produce evidence of any limitation upon the finality of the Chief Surgeon's decision or of any three-doctor panel arbitration provision in the agreement. In denying the carrier's first motion for summary judgment on March 27, 1961, the court pointed out the

lack of any affidavit showing such a contractual limitation or evidence in aid of interpretation which would establish either a limitation or an ambiguity (R. 53-54). Nothing was added in his affidavit of May 29, 1961 (R. 99-101) opposing the carrier's second motion, except the fact that Mr. Gunther was thoroughly familiar with the agreement and "its interpretation and application by the parties thereto in the operations of defendant." The judgment was granted on September 27, 1961 (R. 104-154). No discovery proceedings were instituted by petitioner during this period or at any time during the case numbered Civil No. 2080-SD-W (161 F. Supp. 295).

A. EVEN IF THE PROFFERED EVIDENCE WERE OTHERWISE RELEVANT IT WAS IN THE POSSESSION OF PETITIONER'S REPRESENTATIVE THROUGHOUT THIS CASE. NO SHOWING OF DUE DILIGENCE OR EXCUSABLE NEGLECT CAN BE MADE.

Mr. Gunther represented engineers in their contract disputes with the carrier (R. 99). He was thoroughly familiar with said engineers' contract, (R. 99-101) and its interpretations in defendant carrier's operations (R. 99). Petitioner's present counsel has represented him continuously for more than four years (R. 313-314). Petitioner's excuse for non-discovery is inter-union rivalry between firemen and engineers (R. 221), but this rivalry did not interfere with his representation of engineers under the engineers' contract (R. 99). Nor does the said excuse obtain from and since March 28, 1960, when petitioner appointed General Chairman Colyar and the Brotherhood of Locomotive Engineers to handle his case to a conclusion, granting "full and complete authority" to prosecute or settle the same (R. 255). In pursuance of the authority Mr. Colyar wrote to the carrier on March 29, 1960 (R. 254). From this unchallenged evidence it appears that any evidence of letters written in

1945 or 1947 was in the files and possession of petitioner's authorized representative at least six months prior to the filing of this action on September 26, 1960 (R. 314). Furthermore, it is significant that despite all of the suggestions by the court over a period of years prior to the judgment the petitioner was not able to cite any instance where an engineer's physical disqualification by the doctors was reversed, challenged or appealed. In these circumstances, it would appear that the existence of a three-doctor arbitration panel provision applicable to him was at the least inherently improbable. In any event, this record does not contain the slightest justification for the reopening of the judgment herein under Rule 60 (b) F.R.C.P.

B. THE "NEWLY DISCOVERED EVIDENCE" DOES NOT SHOW THAT THERE WAS A THREE-DOCTOR ARBITRATION PANEL OR ANY OTHER LIMITATION ON THE DECISION OF THE CHIEF SURGEON APPLICABLE TO ENGINEERS ON THE SD&AE RAILROAD.

Even if the 1945-1947 letters had been introduced either prior to judgment herein or within the period during which a motion for a new trial could be made, it would not have established any limitation whatever upon the finality of the Chief Surgeon's decision disqualifying a locomotive engineer because of heart trouble.

Briefly, it is petitioner's asserted position in his affidavit that until June 5, 1962, "it was my understanding that the SD&AE-BofLE agreement contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel until January 1, 1956 . . ." (R. 222, lines 6-9). The said affidavit of Mr. Colyar, General Chairman of the Brotherhood of Locomotive Engineers, purports to show that in 1944 the Engineers agreed with the carrier that interpretations of the separate and distinct engineers agree-

ment with Southern Pacific Company would be applied to similar provisions in the agreement between the Engineers and the (SD&AE) carrier in the instant case and that a letter of 1947 indicated such an interpretation on Southern Pacific.

The question to be resolved by the District Court was whether petitioner should be permitted to reopen the judgment which had been entered eight months ago in light of the following facts:

1) The Adjustment Board in Award 17646 (R. 7-8) and its Interpretation (R. 10-11) did not point to or rely upon the alleged rule or any agreement provision at all. Nor would the three-doctor panel which the Board ordered satisfy the requirements of the alleged 1947 letter. No specialist in the disease (heart) was ordered by the Board and it did *not* require a decision as to the engineer's ability to conform to *company prescribed standards* or even refer to such standards (R. 317). Mr. Colyar's proposed evidence would destroy petitioner's position by showing that the Adjustment Board's order was incorrect.

2) The proposed evidence of Mr. Colyar would be inconsistent with the petitioner's evidence herein that as of the date of reprinting, the engineers' agreement contained all amendments and constituted the entire agreement (R. 188, line 25, through R. 189, line 13). The District Court asked petitioner's counsel at the hearing why the provision for a three-doctor panel was not in the January 1, 1956, agreement if it had, as alleged, been negotiated between 1935 and 1956 to apply to engineers of defendant carrier (R. 315). No direct answer was given. In a later brief he replied that "A reasonable inference to be drawn for its omission" is

inadvertence (R. 315).* Mr. Gunther, who worked as an engineer, actively enforced the engineers' agreement for other locomotive engineers (R. 99) and is thoroughly familiar with its interpretation and application (R. 99), was never aware of any such agreement provision (R. 221).

3) The proposed evidence would be inconsistent with Mr. Colyar's Section 6 demand (45 U.S.C. 156) dated August 28, 1959, to adopt a three-doctor panel provision as section 1 of article 35 of the engineers' agreement (R. 214) and the subsequent agreement of the parties, in response to said demand, effective December 1, 1959 (R. 217-218).

The District Court properly concluded (R. 314):

> "We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavits, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE railroad."

IV. The Judgment in the Prior Action in the District Court Between the Same Parties on the Same Cause of Action Constitutes a Bar to This Action.

On March 22, 1957, petitioner filed his "Petition to Enforce Award and Order of National Railroad Adjustment Board" in the District Court against this defendant. The allegations of the 1957 petition in Civil No. 2080-SD-W

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*On January 26, 1955, General Chairman Colyar wrote to carrier "in acordance with Article 68" of his desire to reprint the agreement (R. 278-284), saying "In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to the present rules or corrections made, whichever is applicable." Article 35 is shown as, "no change" (R. 282) despite counsel's explanation that the amendment to said article was omitted by "inadvertence."

(198 F. Supp. 40) are substantially the same as those in the instant petition. The instant petition was filed September 26, 1960, as Civil No. 2459-SD-W. Both the 1957 petition and the instant petition alleged the same breach of the collective bargaining agreement on December 30, 1954, as the basis of petitioner's claim for relief. On April 15, 1958, the District Court issued its Memorandum Opinion and Order which stated on page 5:

> "We find that the complaint states no facts showing that any award or order has been made by the Adjustment Board with which the carrier has not complied.
>
> "We shall hold this cause on our calendar until July 14, 1958, at which time, in the absence of any cause to the contrary shown, the carrier may present to the court findings, conclusions and judgment in accord with this memorandum (DePriest v. Pennsylvania Railroad Company, 145 F. Supp. 596, 600)."

Thereafter on June 28, 1958, petitioner forwarded to the First Division, NRAB, a document entitled "Ex Parte Submission" seeking an interpretation of Award 17646 which would be "so worded as to make his right to reinstatement absolute and unconditional, providing back pay to October 15, 1955 . . ." At the same time he filed with this court a "Notice of Motion and Motion for Stay of Proceedings", together with an affidavit signed by him, which concludes: "WHEREFORE affiant requests a stay of these proceedings pending determination upon said submission by said Board."

By minute order of July 24, 1958, the District Court granted petitioner's motion to stay proceedings until February 16, 1959, and at the same time continued carrier's motion for summary judgment to the same date.

Subsequently, on October 8, 1958, the First Division, NRAB, issued its Interpretation and Order which were

responsive to the "Ex Parte Submission" of petitioner described above.

Carrier thereafter presented a motion to this court for leave to file a counterclaim seeking injunctive relief against petitioner's threat to instigate a strike or other economic pressure to enforce the so-called Interpretation and Order of October 8, 1958, and to bring the same (R. 10-12) before this court with the prayer that it should be determined to be void for a number of reasons, including those which had already been enumerated in the case. The motion was set for hearing on February 16, 1959.

Petitioner filed his brief in opposition to carrier's motion under date of January 3, 1959, stating in part as follows:

> "The proposed counterclaim is premature. The Interpretation, Award and Order issued by the National Railroad Adjustment Board on October 8, 1958, has not, as yet, been presented to this court by petitioner for enforcement . . ." (page 1)
>
> "Petitioner's request for enforcement of said Interpretation, Award and Order will be made either in the form of a supplemental petition in this action or by the filing of a new petition. It will be done prior to February 16, 1959." (page 2)

Notwithstanding the foregoing, petitioner, on February 7, 1959, filed a motion for dismissal without prejudice under F.R.C.P. 41(a)(2). In his affidavit in support of the motion, petitioner's attorney attached a copy of the October 8, 1958, documents (R. 10-12). The gist of this motion was set forth on page 2 of petitioner's memorandum of February 7, 1959, viz:

> "This Court has, in effect, ruled the initial petition herein to be defective for failure to state a claim. Hence, petitioner must plead his now clearly established right to reinstatement by way of a new petition; not by way of a supplemental pleading in this action."

In conjunction with his motion petitioner served a proposed order to be signed by the court entitled "Dismissal for Want of Jurisdiction."

On February 9, 1959, the court issued an Order denying carrier's motion to file the counterclaim. At page 2 of this Order the court stated:

> "Petitioner has not filed with this Court any proceedings to enforce any further award against the defendant, nor has he brought to the Court's attention any further award or any interpretation of the award which was the subject of this action."

The Transcript of Proceedings dated March 6, 1959, of the hearing before the court on the petitioner's motion to dismiss for lack of jurisdiction and the carrier's motion for summary judgment shows that the former was denied and the latter was granted.

Notwithstanding all of the foregoing, petitioner did not, at any time prior to the entry of judgment, file with the court the so-called Interpretation and Order of October 8, 1958. On April 8, 1959, the District Court rendered summary judgment in favor of carrier and against petitioner which was not appealed.

The instant action was filed on September 26, 1960, in which petitioner seeks the same relief for the identical alleged breach of contract on December 30, 1954. Petitioner relies upon the professed "Interpretation" and "Order" of October 8, 1958, which he had obtained during the continuance granted to him for that purpose by the District Court and which he declined to incorporate in the prior proceeding in Award No. 17646, Docket 33531.

In the first suit on this cause of action, petitioner could have put into evidence the interpretation of the first order and award. Petitioner did not choose to do so. Instead peti-

tioner now seeks to introduce the interpretation for the first time in a second suit. The law is clear and well established that where a second action is based upon the same cause of action as that upon which the first was based, the judgment in the first action is conclusive as to all matters which were litigated or might have been litigated in the first action.

Restatement, Judgments § 48 (1942)
Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1948)
Angel v. Bullington, 330 U.S. 183 (1946)
Commissioner v. Sunnen, 333 U.S. 591 (1947)

In the leading case of *Angel v. Bullington,* 330 U.S. 183, 193 (1946) the court stated:

> ". . . Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion.

In *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1947), the same court observed that res judicata is a doctrine of judicial origin, and said:

> ". . . The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon consideration of economy in judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any

other admissible matter which might have been offered for that purpose.' "

In *King v. International Union of Operating Engineers,* 114 Cal. App. 2d 159, 250 P.2d 11 (1952), the court was confronted with the question of whether prior litigation in representative capacity by members of a union local against their international was res judicata because the prior decision involving the same cause of action was based on the failure of the members to exhaust their intra-union remedies. The appellate court held for the respondent union on the ground that the prior decision had in fact been on the merits and was thus res judicata in the present action.

In connection with the last point, it is revealing to note the language of Justice Frankfurter, speaking for the majority in *Angel v. Bullington, supra,* at page 187:

> "For purposes of *res judicata* the significance of what a court says it decides is controlled by the issues that were open for decision."

To demonstrate the propensity of the courts to apply the doctrine of res judicata where applicable, the attention of this court is directed to *Williamson v. Columbia Gas & Electric Corp.,* 186 F.2d 464 (1950). There the United States Court of Appeals for the Third Circuit, citing Restatement, Judgments § 43 (1942), held that an adjudication in favor of defendant in an antitrust action on the ground that the action was barred by the statute of limitations was res judicata as to another suit in the same cause of action *even though the action later begun was finished first.*

It is elementary that the rule of res judicata can be properly invoked by a Motion for Summary Judgment. *Curacao Trading Co. v. Federal Insurance Co.,* 3 F.R.D. 203 D.C. N.Y.); 6 *Moore's Federal Practice, 2d Ed.,* p. 2258. It fol-

lows that since the entry and finality of the prior judgment are not open to challenge, the competency of the court rendering said judgment is clear, and the essential issue and the parties concerned in said judgment are the same here as in the prior case, summary judgment for carrier, based on the rule of res judicata, is appropriate here.

V. As the October 8, 1958 Interpretation and Order Is the Same Cause of Action Presented in the Prior Action No. 2080-SD-W (198 F. Supp. 402) Its Presentation in the Instant Action Is Barred by the Statute of Limitations. The Delay in the Instant Action Likewise Supports the Defense of Laches.

We have heretofore demonstrated that the October 8, 1958, Interpretation and Order (R. 10-12) are simply an attempt by the First Division, NRAB, to improve upon the October 2, 1956, Award and Order (R. 7-9). Both relate to a claimed violation of the collective bargaining agreement on December 30, 1954. Having before it no new evidence other than the three-doctor panel reports, the Board's second action by way of "Interpretation" does not revitalize its prior final Award. (Exhibits A and B to the petition are based on the same cause of action (R. 7-12).)

Petitioner filed suit in the District Court on March 22, 1957, to enforce Award No. 17646, Docket 33531, and the Board's Order thereon.

Approximately one year and three months after he commenced this action, petitioner requested and was given a continuance of almost seven months in which to obtain an interpretation of this award. The transcript of hearing of July 14, 1958, on petitioner's motion for a continuance, shows that petitioner was not going into the whole subject anew, but that he was simply seeking to perfect the award. Petitioner's attorney advised the court that it would be necessary to arrange this continuance to avoid the doctrine of res judicata.

During the period of the more than six-month continuance, petitioner obtained an Interpretation by the First Division, Adjustment Board (R. 10-11). In fact, the Interpretation was issued less than three months after July 14th, viz., on October 8, 1958. Yet the statement of the case above shows that he failed and declined to bring it to the attention of the court. When he threatened strike action to force the defendant to yield, the latter moved the District Court to permit the filing of a counterclaim which, had it been allowed, would have brought the so-called Interpretation to the court's attention.

We have shown that petitioner's failure and refusal to amend his petition to include the Interpretation throughout the four-month period after its issuance has resulted in a judgment against him on the merits. As pointed out above, the doctrine of res judicata bars the new petition which has been filed more than a year and five months after the judgment was entered against him.

Likewise, the second claim on the same cause of action is barred by the two-year statute of limitations contained in Section 3 First (q) of the Railway Labor Act (45 U.S.C. 153 First (q)). This section states:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, *and not after.*" (Emphasis ours.)

On October 2, 1956, the First Division, Adjustment Board, issued its final Order to carrier requiring it to comply on or before November 2, 1956 (R. 9). The purported Interpretation cannot be considered a second award in connection with the matter since it is not proper to render two awards in connection with the same subject matter (45

U.S.C. 153 First (m)). The provision for interpretations in the latter section does not affect the finality of the Award and Order of October 2, 1956. Consequently, petitioner had two years next after November 2, 1956, in which to file a petition under the Railway Labor Act. His failure to file such a petition within that period of time or to incorporate the Interpretation into the action which was pending before this court has resulted in the loss of his claim under the Railway Labor Act. *Joint Council, etc. v. Delaware, L. & W. R.R.*, 157 F.2d 417, 420 (2d Cir. 1946); *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 70 F. Supp. 914 (N.D. Ind. 1947), *aff'd* 166 F.2d 326 (7th Cir. 1948).

The Summary Judgment procedure may be used effectively in the area of affirmative defenses such as these. 6 Moore's Federal Practice, 2d Ed., 2262; *Gifford v. Travelers Protective Ass'n*, 153 F.2d 209 (9th Cir. 1946).

VI. A Purported Award of the National Railroad Adjustment Board Issued Without Jurisdiction Is Void and Unenforceable.

The jurisdiction of the National Railroad Adjustment Board is established by 45 U. S. Code, section 153, which reads in part as follows:

> "First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—....
>
> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes

> may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

It has been held that the jurisdiction of the National Railroad Adjustment Board under these provisions is limited to the enforcement of contract rights of the parties and the Board has no authority to create rights other than those created by the contract between the parties.

Thus in *Southern Pacific Co. v. Joint Council Dining Car Employees,* 165 F.2d 26, *supra* in footnote 2, the Court of Appeals for the Ninth Circuit said:

> "Section 3, subd. First, Subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

The court noted that the Board itself has interpreted its own powers the same way, and quoted the Board as saying:

> "From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties. . . ."

In *Thomas v. N. Y. Chicago & St. L. R.R.*, 185 F.2d 614, *supra*, the Court of Appeals for the Sixth Circuit, in passing upon a claim of wrongful discharge which had been presented to the National Railroad Adjustment Board, said:

> "Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged only if some right arising out of contract or the law was violated by his discharge."

In the present case, therefore, the plaintiff cannot rely upon any decision of the National Railroad Adjustment

Board unless he can point to some provision of some contract limiting the right of the carrier to rely upon the decision of its Chief Surgeon as to the physical ability of employees to operate engines on trains.

The decision of the National Railroad Adjustment Board in this case does not cite any contract provision limiting in any way the right and duty of the railroad to see that only employees determined by it to be physically qualified are entrusted with the responsibility of operating its trains and other equipment. Under the circumstances it is clear that the award of the National Railroad Adjustment Board, First Division, was in excess of the jurisdiction of the Board.

CONCLUSION

In compliance with the undisputed requirement that locomotive engineers over seventy years of age must take and pass quarterly physical examinations in order to operate locomotives on trains, petitioner was examined and disqualified on December 31, 1954, by reason of the presence of a heart disease which could lead to a coronary episode. Thereafter, petitioner obtained what the Adjustment Board later considered to be a "generally equivocal" (R. 8) but conflicting opinion of another doctor. Solely on the basis of this, and without any basis in the Engineers' agreement, the Adjustment Board ordered that a compulsory arbitration panel of three doctors should be convened to decide the physical qualifications of petitioner. Concluding that the arbitration was favorable to petitioner, the Board ordered the carrier to reinstate petitioner and pay him for all time lost since October 15, 1955. The carrier refused to comply with the order as provided in 45 U.S.C. 153, First (p), because the Board had exceeded its jurisdiction in writing

a contractual arbitration provision for the parties in cases where the doctors have disqualified engineers upon physical examination.

The petitioner was General Chairman of the Firemen's Union, worked as an engineer and handled disputes for other engineers under the agreement with which he was thoroughly familiar. No claim is or could be made that there was any lack of good faith on the part of the carrier or its doctors. Despite his qualifications the petitioner at all times to the date of judgment in this case understood that there was no provision for arbitration by three doctors in the agreement (R. 222). The court accordingly held that the undisputed facts proved that no such arbitration provision existed; that the decision of the Chief Surgeon was final and that the Board had exceeded its function of "interpretation" of collective bargaining agreements. The petitioner had repeated invitations from the court to introduce any contrary facts over the period of some thirteen months herein and during the prior proceeding reported in 198 F. Supp. 402. No such facts were presented and there was no genuine issue of material fact to preclude the issuance of summary judgment on October 27, 1961.

Some eight months thereafter petitioner moved the court to reopen the judgment to admit newly discovered evidence which he assertedly could not theretofore have discovered by the exercise of due diligence. The court denied this motion, after hearing, on the basis that petitioner had not instituted any discovery at all during the four-year period of litigation; that petitioner's argument that the Engineers' Union would not show him their files could not overcome the fact that eight months before the date when he filed this petition he issued a power of attorney to the Engineers' Union to handle this very case on his behalf and to settle,

prosecute or appeal it to a conclusion; and that there was not a shred of evidence to support his claim of excusable neglect or use of due diligence. The court nevertheless heard and considered the evidence offered by petitioner and found that it would not show the existence of such a three-doctor arbitration panel in carrier's agreement even if it were admitted into the case.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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Dated April 30, 1964.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Dated: April 30, 1964